Counsel Fee Waivers in Prenuptial Agreements following *Kessler*[1]

Elliott Scheinberg

Prenuptial agreements are governed by the ordinary tenets of contract law[2] and, in typical fashion, seek to sweepingly insulate assets from the reach of nonpropertied-parties in the event of marital dissolution. Threats to cancel a wedding absent an acceptance of a hard bargain insisted upon by the propertied-party are not actionable as duress “because [the] exercise or threatened exercise of a legal right [does] not amount to duress.”[3] The nonpropertied-party can obviously also call off the event if dissatisfied with the proposal.

Prenuptial agreements routinely include provisions waiving counsel fees, which waivers constitute a barrier to such awards absent a prior vacatur of the underlying agreement.[4] A superficial reading of *Kessler v. Kessler,*[5] a difficult decision, incorrectly leads to the inference that the Second Department has eviscerated counsel fee waivers, which reading may embolden the improper commencement of wholesale proceedings to vacate prenuptial agreements. As discussed below, *Kessler* must and can only be limited to facts similar to its own.

The Kessler prenup did precisely what any prenup is expected to do, it broadly shielded Mr. Kessler’s assets and any appreciation therefrom, subject to the distribution of certain acquired assets. There was complete disclosure by both parties: the wife's assets were valued at $135,596 and the husband's at almost $4,000,000. The financial schism widened during the marriage: the wife’s net worth remained essentially the same while the husband’s grew to $5.6 million.

The parties had incurred “telling” legal fees ($150,000 and $165,000) (the record was unclear how much of the fees were attributable to custody and child support (not controlled by the prenup) and the wife’s unsuccessful rescission and reformation bid (not compensable under

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[1] N.Y.L.J.,

[2] Bloomfield v. Bloomfield, 97 N.Y.2d 188 (2001); Lemle v. Dreifus, 30 A.D.2d 785 (1st Dept., 1968); Spirt v. Spirt, 289 A.D.2d 392 (2nd Dept., 2001); Pacchiana v. Pacchiana, 94 A.D.2d 721 (2nd Dept.,1983); Meccico v. Meccico, 76 N.Y.2d 822 (1990).

[3] Colello v. Colello 9 A.D.3d 855 (4th Dept., 2004).

[4] Klein v. Klein 246 A.D.2d 195 (1st Dept.,1998); Meehan v. Meehan 245 A.D.2d 350 (2nd Dept.,1997); Demis v. Demis 168 A.D.2d 840 (3rd Dept.,1990); Fixler v. Fixler 290 A.D.2d 482 (2nd Dept.,2002); Breen v. Breen 114 A.D.2d 920 (2nd Dept.,1985).

[5] Kessler v. Kessler, 33 A.D.3d 42, 818 N.Y.S.2d 571 (2nd Dept., 2006).

DRL § 237[6])).

Critical on appeal was the wife's right to seek fees to prosecute property issues that had arisen from the prenuptial agreement: property acquired during the marriage subject to distribution, possible commingling of money, what property was specifically contemplated under the agreement, and custody. The court below rejected the wife's demand for rescission, reformation, and a declaration that the agreement was void because of duress and otherwise total unconscionability. However, the provision waiving counsel fees in connection with property distribution was held unconscionable and unenforceable in light of the strong public policy under Domestic Relations Law (DRL) § 237(a). The Second Department affirmed: "the statutory scheme trumps an agreement if there is an inconsistency."

The Second Department stated that the enforceability of a waiver of the right to seek counsel fees presents a clash of two competing public policies: (1) the resolution of marital disputes by agreement,[7] and (2) the leveling of financial disparity between spouses to assure that matrimonial outcomes are not predetermined based on "the weight of the wealthier litigant's wallet."

The Court of Appeals has previously observed that "[n]otably, in matrimonial cases, public policy considerations abound."[8] It should come as no surprise that in this collision of policies one involves the right to resolve disputes by contract, as noted in *Kessler*: (1) the right to contractual dispute resolution has never been without limitation, i.e., contracts may not violate any law or public policy; and (2) the State retains a supervisory role in matrimonial matters exercising heightened scrutiny beyond that afforded contracts in general: (i) taint by fraud and duress; (ii) amounts and duration of spousal maintenance 'must be fair and reasonable at the time [] made, and not unconscionable at the time of entry of final judgment..."; (iii) spouses may not contractually relieve each other of the requirement of support to the extent that either may become a public charge (iv) the child support recitations and calculations subject to continuing judicial discretion; (v) unenforceability of custody provisions in prenuptial agreements; and (vi) relocation of children.[9]

Kessler continued that although DRL § 236B(3) permits the contractual termination of matrimonial disputes as to "matters such as, inheritance, distribution or division of property,

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[6] Anonymous v. Anonymous*,* 258 A.D.2d 547 (2nd Dept., 1999).

[7] Matter of Greiff, 92 N.Y.2d 341 (1998).

[8] Hirsch v. Hirsch, 37 N.Y.2d 312 (1975); (1) spousal maintenance: Hirsch, supra; (2) custody, Merrill Lynch, Pierce, Fenner & Smith v. Benjamin 1 A.D.3d 39 (1st Dept., 2003); (3) child support: Tompkins County Support Collection Unit ex rel. Chamberlin v. Chamberlin, 99 N.Y.2d 328 (2003).

[9] See, citations in Kessler for (1) - (2)(v).

spousal support, and child custody and care ...", the right to enter into an agreement regarding fees is not expressly addressed in the DRL; the right to fees is governed separately under DRL § 237(a), a statutory anomaly to "the 'American rule' that attorney's fees are an incident of litigation to be borne by the respective parties",[10] thereby making § 237(a) "more than a mere permissive legislative grant of authority." The Second Department emphasized that DRL § 237 "has deep statutory roots, designed to redress economic disparity between the monied and the non-monied spouses .. that the matrimonial scales are not skewed by the weight of wealthier litigant's wallet."

However, two factors are critically inescapable in this reasoning: the first, in crafting § 236B(3) the Legislature used non-limiting and non-exhaustive language, to wit, "matters *such as*..."; the legislators could have used restrictive language to specifically exclude counsel fees but did not. A primary canon of statutory construction instructs that it is incorrect to impute into the statutory scheme that which the Legislature did not include:

> ... legislative intent is to be ascertained from the words and language used construed according to its natural and most obvious sense ... Words will not be expanded ... to enlarge their meaning to something which the Legislature could easily have expressed but did not ... A statute should not be extended by construction beyond its express terms or reasonable implications to its language ... statutory language is to be read in accordance with its ordinary and accepted meaning, unless the Legislature by definition or from the rest of the context of the statute provides a special meaning ...[11]

Second, this reasoning further fails because child support and custody, both matters of public policy, and inheritance are governed by separate statutes and are, nevertheless, cited as *examples* of what may be included in a marital contract. It does not follow logically that fees occupy a higher plateau on the public policy hierarchy than any child related issue so as to be precluded from resolution by agreement.

Kessler's admonition that "[c]areful and individualized scrutiny ... on a case-by-case basis after weighing the competing public policy interests in light of all relevant facts and circumstances *both* at the time the agreement was entered and at the time it is to be enforced" is not coextensive with governing law because it imposes, via judicial fiat, a heretofore absent two prong test into § 237,[12] which prongs must be satisfied conjunctively, and which mirrors the dual prong requirements regarding spousal maintenance set forth in § 236B(3). *Kessler* thus reaches

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[10] Matter of A.G. Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1 (1986).

[11] Statutes § 94.

[12] Statutes § 94: "... new language cannot be imported into a statute to give it a meaning not otherwise found therein."

far beyond *Christian v. Christian*[13] where the Court of Appeals focused on the circumstances surrounding the agreement as the indispensable factor behind the lopsided distribution of assets, to wit, whether the pronounced distributive asymmetry was the product of the wrongdoing of its proponent.

Following *Kessler* litigation expenses for both parties will thus be fueled by the eager movant. The resisting spouse will have to exert every Herculean effort to track no longer extant documents to satisfy the first part of the test, absent which he or she may likely be assured an undeserved defeat and the greedy spouse an unjust reward.[14]

The Court expressed its concerns over the agreement:

- "the great disparity between the relative financial positions of the parties ... both at the time the [] agreement was executed and at the time th[e] action was commenced" – the aforementioned two pronged test;

- "the prenuptial agreement helped assure that the [financial] imbalance would remain";

- 'no reflection in the prenup as to the specific facts and circumstances of the parties as they relate to a fee award";

- "a blanket waiver of the right to seek fees regardless of the length of the marriage or what occurred therein" gave the wife "little more than a limited right to occupy the marital home, which remained the husband's separate property" "[making] limited provision for [her] during the marriage ... with little or nothing in the event of divorce" – the Court, however, overlooked the realities of the wife's overall escalated lifestyle that she would not have otherwise enjoyed.;

- the agreement provided no "consideration to be given at the time of the matrimonial action to the various issues relevant to an award of an attorney's fee, including, inter alia, the quantity and complexity of the issues to be litigated, and the relative means of the parties to do so."

Since the court centered on the "great disparity" between the parties, it must be asked, if disparity, great or otherwise, in and of itself, gives rise to public policy concerns; if it does, then fee waivers should be void from the very moment parties with significant asset gaps sit down to negotiate a prenup that includes a fee waiver. Moreover, according to *Kessler*'s two prong test,

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[13] Christian v. Christian, 42 NY2d 63 (1977).

[14] See, Bloomfield v. Bloomfield, 97 N.Y.2d 188 (2001); DeMille v. DeMille, 5 A.D.3d 428 (2nd Dept.,2004).

although the waiver might have been acceptable at the time the prenup was first negotiated, it will likely be deemed tainted once the relative financial positions have broadened during the marriage. Also, at which point does the disparity become sufficiently "great" to invalidate the waiver on public policy grounds?

Conclusion

Kessler must be construed only as to specifically discernable property issues arising out of a prenuptial agreement not clearly defined within the context of the agreement, as in *Kessler*, where the nonpropertied-spouse will be deprived of the opportunity to prosecute his or her rights thereunder absent a fee award. This is supported by the language that "in the absence of at least a determination as to whether an award of an attorney's fee is warranted pursuant to DRL § 237 *as they concern matters arising under ... the agreement*, the matrimonial scales will be skewed in favor of the husband's heavier wallet. The wealthier spouse should not be permitted, by the same agreement, to both opt out of the statutory scheme concerning an award of an attorney's fee and prevent an effective assessment of how important an award of an attorney's fee may be."

Further support that the Second Department specifically intended this decision to be construed narrowly and not broadly with respect to all vacatur proceedings is underscored by its emphasis that counsel fees are statutorily unavailable for proceedings to vacate agreements; this should severely restrict "reverse-duress-litigation" involving trawling expeditions dredging for anything with which to upset a prenup, irrespective of the aboveboard negotiations that lead to its execution, aimed at impelling financial concessions as the lesser evil over the black hole of protracted litigation.

In sum, to give this decision a broad application: (1) violates settled law; and (2) destroys the incentive for propertied-parties to contemplate marriage with anyone from an unequal financial station.